

Western New England Law Review

Volume 39 39 (2017)

Issue 3 SYMPOSIUM: GENDER AND
INCARCERATION

Article 2

2017

PRISONS PRIOR TO MASS INCARCERATION: THE IDEOLOGICAL FOUNDATIONS OF WOMEN'S DEPENDENCY

Jen Manion

Amherst College, jmanion@amherst.edu

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Jen Manion, *PRISONS PRIOR TO MASS INCARCERATION: THE IDEOLOGICAL FOUNDATIONS OF WOMEN'S DEPENDENCY*, 39 W. New Eng. L. Rev. 371 (2017), <http://digitalcommons.law.wne.edu/lawreview/vol39/iss3/2>

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

PRISONS PRIOR TO MASS INCARCERATION: THE IDEOLOGICAL
FOUNDATIONS OF WOMEN'S DEPENDENCY

*Jen Manion**

This article examines punishment from a long time ago—over 200 years. Some of it might sound strange to our contemporary sensibilities, but much of it will sound very familiar, perhaps eerily so. Knowledge of this history is crucial for those dedicated to structural transformation of today's criminal injustice system. Mass incarceration—which entraps black and brown people in an ever-expanding web of control and violence—is a contemporary phenomenon and a backlash to the civil-rights gains of the 1960s. But the modern penal system from which it stems was designed a long time ago, when incarceration became the premier form of punishment, replacing long-standing usages of a wider range of punishments including whipping, carting, stocks and pillory, fines, and capital punishment.¹ This transformation from chiefly corporal punishment to punishment by imprisonment occurred simultaneously alongside the creation of American democracy.²

One of the most-cited lines from the 1776 Declaration of Independence is the call for “unalienable Rights, . . . Life, Liberty, and the pursuit of Happiness.”³ A decade later in 1786, Pennsylvania doctor Benjamin Rush shared his vision for a new system of punishment that would separate a person from their family and deny them freedom. On his list of reasons for devising such a system, two stand out. The first is that “[a]n attachment to kindred and society is one of the strongest feelings in the human heart. A separation from them, therefore, has ever been considered as one of the severest punishments that can be inflicted

* Professor, Amherst College.

1. HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 27 (Bobbs-Merrill 1927).

2. MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835*, 131–213 (1996).

3. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

upon man.”⁴ Rush’s other point focuses on the denial of freedom. “Personal liberty is so dear to all men, that the loss of it, for an indefinite time, is a punishment so severe, that death has often been preferred to it.”⁵ Perhaps what is most remarkable is how quickly his friends throughout the government and judiciary embraced this proposal and transformed what was functionally a county jail for Philadelphia into the nation’s first state penitentiary in 1790—Walnut Street Prison.⁶

The nation’s first penitentiary helped to advance a role for women that was principally that of domestic partners to men, promoting what I describe as a heterosexual political economy in which the only viable role for women was to partner with, submit to, and remain functionally dependent on a man. A woman’s domestic labor was of no monetary value but was indispensable for the family unit. This was done by using the carceral state to target and punish women who were independent economic actors, and who by choice or circumstance were not receiving economic support—or enough economic support—from a man.

Once imprisoned, these women were denied the opportunities given to men to develop a trade or marketable skill. Instead, they were forced to do the domestic labor of the institution—cooking, cleaning, sewing, and even some nursing. This cycle punished women with initiative, creativity, skills, and resourcefulness from doing the very same things that men were rewarded for doing. Even short-term imprisonment on charges of vagrancy could destroy a woman’s livelihood because her regular customers would have to turn to someone else to buy goods or receive services usually done by her, such as laundry. Even short-term imprisonment while awaiting trial on charges of assault and battery could destroy a woman’s family, especially if she was the sole or primary caregiver for her children, as they might be taken away from her.⁷

This system disproportionately targeted African American,

4. BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY, READ IN THE SOCIETY FOR PROMOTING POLITICAL ENQUIRIES, CONVENED AT THE HOUSE OF HIS EXCELLENCY BENJAMIN FRANKLIN, ESQUIRE 10 (Phila., Joseph James 1787).

5. *Id.*

6. NEGLEY K. TEETERS, THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA 1773–1835 39 (1955).

7. See generally JEN MANION, LIBERTY’S PRISONERS: CARCERAL CULTURE IN EARLY AMERICA (2015).

European immigrant, and poor Anglo and Irish-American women, it ignored the social and economic realities of their lives, and it measured them against the evolving ideals of republican motherhood that middling and elite white women were increasingly expected to aspire. What I hope to demonstrate is that even though this happened hundreds of years ago, policies devised during this period marked gender dependency, racial difference, class bias, and sexual deviancy in a way that remains, and continually shapes incarceration practices.⁸

There were three different classes of prisoners held together in the same institution over a period of about thirty-five years. Convicts made up the smallest percentage—they were charged with crimes (typically larceny) punishable by imprisonment of one year or more. Most incarcerated individuals were classified as prisoners for trial. They were detained awaiting trial, usually because they could not afford to pay a surety to guarantee they would return for trial—what we call bail. Some people who were imprisoned under this category were found guilty of a charge that was punishable by a fine, which they could not afford to pay. Similarly, others who were found innocent of a charge but were unable to pay the court fees associated with the hearing were also imprisoned. Our system targets the most impoverished in our communities while also requiring those very same people to finance it.⁹

The subject of fines and fees was at the heart of one of the first public debates about changes to the system of punishment. In 1785, the city of Philadelphia sent a grand jury to inspect the conditions of the county jail. They found numerous people who were being held for fines that they would never be able to pay. One juror focused on the plight of an incarcerated white woman: Eleanor Glass. He argued that the wrongful imprisonment of Glass, not to mention the degrading and vile conditions of the jail, was outrageous, upsetting, and unacceptable. This account was part of a growing movement of humanitarianism aiming to generate positive change. The other side, however, was also represented by an instantaneous rebuke of this account, charging

8. The arguments presented in this Article come from my book, unless otherwise noted. *See id.*

9. *See* BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/SP6P-DATX>] (discussing controversies about excessive use of fines and fees in punishment abroad).

that the woman did not deserve anyone's sympathy because she was a sex worker. In this post-revolutionary moment, filled with the potential to transform old systems built on violence, exploitation, and hierarchy into something more humane, fair, and equitable, the lines were drawn. Women who refused to blindly and continually obey the wishes and orders of their masters, employers, husbands, fathers, and even brothers would be targeted by a different patriarchal authority—the carceral state. This might sound more clear-cut, like men had power and women did not, than it actually was.

The truth, in fact, was dynamic. Let me begin with African American women in the north at that time. African American women (and men for that matter) occupied a range of legal statuses in early Philadelphia including: enslaved, indentured, bound, and free.¹⁰ The city was home to one of the largest free black communities in the country following the passage of the Gradual Abolition Act of 1780, which called for the gradual abolition of slavery for those residing in the state, but offered immediate emancipation to anyone who could run away and cross the state's borders.¹¹ Children born to enslaved women after its passage were indentured servants—forced to work, until a certain age, for the person who owned the labor of their mother.¹² Black girls from the almshouse could also be bound out for a period of time to labor in a family. At the same time, Irish and English immigrants, a smattering of people from other countries, and even second-generation poor whites would occupy a range of positions in the labor market with one exception: they were not enslaved.¹³ Race was not yet a singular indicator for determining the likelihood of one's imprisonment, but class certainly was. People of middling and upper classes were simply not subject to the carceral state, save the exception of those formerly wealthy who had fallen into debt and found themselves in debtor's prison.¹⁴ And so black and white

10. See generally ERICA ARMSTRONG DUNBAR, *A FRAGILE FREEDOM: AFRICAN AMERICAN WOMEN AND EMANCIPATION IN THE ANTEBELLUM CITY* (Christine Stansell ed., 2008).

11. GARY B. NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720–1840* 60 (1988).

12. GARY B. NASH & JEAN R. SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH* 122–23 (1991).

13. See generally SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": LABOUR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682–1800 (1987).

14. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF*

women shared prison cells throughout this period—especially under the looser categories of charges such as vagrancy and prisoners for trial.

The real story of racism in punishment emerges in the records of convicts. Black women were more frequently convicted than white women and served longer sentences for their crimes from 1798 onward to the end of my study, which was 1835. This is remarkable when you consider that black women made up such a small percentage of the overall number of women in the city. One thing is clear: black women bore the brunt of the criminalization of African Americans in the early nineteenth-century north. This is not to say that black men were not also criminalized—or that they were not punished at a rate disproportionate to their presence in the population—because they were. But it did not compare to how the system worked against black women at every turn. Black women had even fewer options for employment than black men—most of them worked as domestic servants and washerwomen. Others sought to sustain themselves in the informal economies that dense urban areas offered: “huckstering,” that is, selling slightly damaged or nearly spoiled goods; selling their time for companionship or sexual intimacies with men; or receiving, storing, purchasing, or selling stolen goods. These occupations put women squarely in the eyes of the expanded roster of constables and night watchmen who were determined to maintain control over the public streets of the growing city of Philadelphia that seemed to be busting at its seams with newcomers.

This vibrant nighttime social culture of an urban seaport attracted a diverse group of people: mariners just off the water, house servants with little free time or agency over their own lives, wandering vagabonds in search of food, shelter, or companionship, and laborers looking to drink off the frustrations of the day. There were many places to partake in this vibrant nighttime culture—from formal establishments such as taverns and inns that were licensed, to informal establishments such as tippling houses and bawdy houses where women were more likely to be in charge of the environment, and the profits.

Threatened by these somewhat illicit businesses siphoning off their profits, established business owners campaigned for greater regulation of licensing. Officials were quick to arrest those found

to be operating tippling, disorderly, or bawdy houses—all of which had high percentages of women operators. The often mixed-race crowds of poor people who might patronize these establishments would be arrested if they lingered in the public streets of the city for too long, if they were deemed to be too loud, or if they appeared to be too intoxicated. Of course, all of these are subjective criteria. For white women in public, unaccompanied by men, any amount of time was too long. For black women, any amount of noise was too much.

Over half of those women incarcerated under vagrancy charges were described in part with the adjective “disorderly” which carried with it the suggestion one was a sex worker. Vagrancy was used to imprison people for thirty days without trial. It was a catch-all category of sorts that enabled constables to sweep the streets of people they did not want there. People were consistently charged with being drunk or disorderly, or both. But another pattern emerged as the population and needs of the urban poor changed. In the 1790s, the spirit of freedom and resistance was still in the air following the American Revolution, as record numbers of enslaved and bound people fought back against the authority and abuse of their masters or employers. They disobeyed orders, yelled, stole household goods, and ran away.

By the 1820s, the number of people in these forced labor arrangements in Pennsylvania was very small, but the number of poor people seeking work or assistance for survival skyrocketed. Those more well-off generally turned against the poor and blamed them for their plight. Officials were quick to imprison people for being homeless or unemployed, and indeed only recognized the types of labor that came with papers from employers to prove their existence. Women of all races were disproportionately targeted by such efforts because they had fewer options for formal paid work than men.

Women who were incarcerated in the nineteenth-century were pawns in a great social experiment. For better and for worse, there was a movement among elites to make punishment more humane and reasoned, less arbitrary and violent. This movement had two main influences. First, it was part of a larger movement of enlightenment thought, evidenced by writings from people such as Montesquieu and Cesare Beccaria, who sought to advance societies away from older models anchored in the assertion of brute force and revenge by appealing to men’s capacity to reason. The other influence was more distinctly American—an attempt to distinguish

American systems from those of old Europe that were deemed excessive and barbaric. In American punishment, people would not be discarded or degraded. They would have sufficient food, clothing, and warmth from the elements. They would have the opportunity to study the Bible, to reflect on their lives, to earn their keep, and to develop a trade. They would not languish indefinitely in prison but would move through the system, be made into better people, or better men at least, in the process. If this sounds fanciful compared to what we know of the treatment of people in the vast carceral network that contains so many with callous regard, it was. A different history of the impact of incarceration on individuals, families, communities, and society more broadly might have been written if these ideas—of compassion, care, treatment, training, and respect—were embraced and stood at the heart of punishment. It was a road not taken.

Instead, the harsh reality of punishment in America's first jails was not dramatically different from their European counterparts. While men were targeted for religious reform and skill development, women languished in their cells, mostly deemed a nuisance by jailers. While men worked in manufactories heading nails and making shoes, women would clean, spin, and sew clothing for the other inmates. While men resisted the authority of the jailers and were known to repeatedly instigate fights, break tools, and even start fires when given the chance, women—at least we are told by those visitors who recorded such encounters—submitted to the authority of the jailers, dutifully did their work, and provided basic nursing care for each other.

This highly gendered perspective probably reflects some truth and some wishful thinking, especially when one considers the significant number of women detained on charges of fighting, assault, or threatening. Many of these women were isolated from their families, children, and livelihoods through the act of incarceration; one night on the town, drinking too much, making too much noise, or being in the wrong place at the wrong time could tear your world apart. Women in prison had just as many reasons as men to be angry or agitated or resistant. But they also had more to lose—expressions of independence and anger were expected, even rewarded when exhibited by men, but would never lead to anything good for the women. Women who wrote petitions framed themselves as submissive, dutiful, and caring. Some of these women—often mothers—wanted nothing more than to return to their children. They were willing to defer to the authority

of the men, including keepers, inspectors, reformers, ministers, judges, or jailers in order to get released. This is just one of the many ways that imprisonment cultivated women's dependency.

While historians of punishment have disproportionately focused on the state penitentiary as a new form of punishment with vast and lasting consequence, it was merely one kind of institution—one structure established as part of a growing web that Foucault termed “carceral culture.” Foucault argued,

[T]he most important effect of the carceral system and of its extension well beyond legal imprisonment is that it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penalty. It tends to efface what may be exorbitant in the exercise of punishment.¹⁵

Scholars have paid less attention to policing authorities, such as constables, night watchmen, and aldermen who asserted near total freedom in sweeping the streets of people they deemed troublesome, undesirable, or unwelcome. This continued and expanded in practice throughout the antebellum period, despite complaints from more senior officials that the large numbers of people contained without real cause led to overcrowded prisons and undermined the aims of reform. This occurred as early as the 1820s. By the 1850s, the number of people in the Philadelphia County Jail (not including state penitentiaries) in one year was nearly unfathomable—in 1857, 15,540 people, of whom 6,708 were in for charges related to alcohol.¹⁶ The financial burden on the state inspired officials to appoint a dedicated agent charged with reducing the number of prisoners for trial. William James Mullen, the appointed “agent,” blamed Philadelphia's unethical aldermen for exploiting their positions for their own gain, claiming, “[o]ur prisons are dismal with the groans of wretches committed by Aldermen upon insufficient cause, and for the sole purpose of extorting fees from them.”¹⁷ Here we are, back to fees and the fact that poor people were disproportionately detained without cause, on the condition that they pay fines or fees with money they

15. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 301 (Alan Sheridan trans., Vintage Books 2d ed.1995) (1979).

16. THE ELEVENTH ANNUAL REPORT OF THE INSPECTORS OF THE PHILADELPHIA (PENN.) COUNTY PRISON: MADE TO THE LEGISLATURE 6 (Phila., J.B. Chandler 1858).

17. WILLIAM J. MULLEN, *THIRD ANNUAL REPORT OF WILLIAM J. MULLEN, PRISON AGENT* 6 (Phila., Jared Craig 1857).

neither had nor were able to access.

In conclusion, incarceration was not, from the beginning, intended for women. This was for practical reasons—men committed the majority of crimes punishable by a long sentence—as well as ideological ones. Women did not matter to elites and were not the intended target of reformatory incarceration. They did not think through the impact incarceration would have on a dependent child or how such a space, filled with and designed for men, would even contain women. They did not care. By the time a group of female reformers took up the cause in the 1830s, it was too late. The system was designed, built, and defended. The idea that women who were incarcerated deserved to be there because they rejected their proper social role as dutiful employees, daughters, or wives dependent on and obedient to a man was established. Black women bore the brunt of this ideology even more severely than white women.

With a growing population and increasing criminalization of poverty, women were imprisoned for reasons large and small, their numbers forcing the system to expand, if not wholly adapt, to their presence. Even the most well-intentioned of matrons and female reformers often viewed the women in prison through the same lens just described.¹⁸ While female matrons were gradually appointed to tend to women's "special" needs and protect them from male guards, they also turned to violence as a tool of discipline and control, just as their male counterparts had.¹⁹

This history is vital for those trying to reduce the impact and reach of the carceral state in American life. Some aspire to reduce the number of people imprisoned through "decarceration" movements. Others aim to abolish prisons all together, instead designing constructive alternatives to enable people to get the addiction treatment, mental health care, education, and job training that they really need. Such efforts require a transformation of ideologies that are embedded into the nation's founding and woven into the very fabric of our democracy: ideas about who belongs and who doesn't belong, about who gets to be treated humanely and

18. ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830–1930* (1984); NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN IN STATE PRISONS 1800–1935* (1985).

19. Jen Manion, *Gendered Ideologies of Violence, Authority, and Racial Difference in New York State Penitentiaries, 1796–1848*, 126 *RADICAL HIST. REV.* 11, 19–20 (2016).

who is deemed less than human, about who is entitled to the revolutionary promises of life, liberty, and happiness—and the fact that our work is not done until the answer, at last, is everyone.